United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1364

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

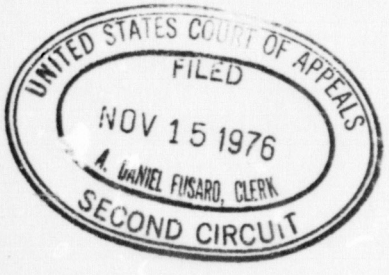
—against—

MARTIN WEINER and EDWARD PASTOR,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR
DEFENDANT-APPELLANT MARTIN WEINER



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OTHER CITFS

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76 - 1364

UNITED STATES OF AMERICA,

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-against-

MARTIN WEINER and EDWARD PASTOR,

Defendants-Appellants.

BRIEF FOR APPELLANT MARTIN WEINER

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York, convicting appellant, after a trial before the Hon. Constance Baker Motley and a jury, of conspiracy to violate, and two substantive violations of, Title 21, United States Code, Section 843 (relating to acquisition of certain controlled drugs by fraud), and sentencing him, on July 26th, 1976, to three concurrent six-month sentences, imposition suspended, and two years probation and a $3,000 fine on the conspiracy count.

On information and belief, payment of the fine has been stayed pending the resolution of this appeal.

SUMMARY OF ARGUMENT

Indictment No. 76 CR 253 charged appellant Martin Weiner and co-appellant Edward Pastor with conspiracy to acquire, and the acquisition of, Schedule III and IV controlled substances (Phendimetrazine and Phentermine) by fraud in violation of Title 21, United States Code, Sections 843(a)(3) and 846. The Government's theory was that together with alleged co-conspirators Charles Fernald and Douglas Berry, who were middlemen acting as arrangers for sales from manufacturers or suppliers to pharmacies, appellants used the name and expired drug registration number of a Dr. Horace Johnson to acquire these drugs. Although themselves licensed to receive these drugs, the Government's theory was that appellants used Dr. Johnson's name and number to evade the record keeping regulations of the federal drug laws.

On this appeal, it will be conceded that if the jury believed all of Fernald's testimony and his "documentation" thereof, and Berry's testimony, there was barely sufficient evidence to convict appellant Weiner.* What will be contended is

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*Fernald and Berry were the only witnesses who gave testimony against Weiner. With regard to Pastor, there was testimony, albeit highly suspect, of an identification of him as attempting to impersonate Dr. Johnson and of a confession.

that in view of the thinness of this evidence, several errors in the admission of evidence, in the prosecutor's conduct and in the lower court's charge, were so harmful as to require reversal.

A large number of documents were admitted to corroborate Fernald's testimony. It will be contended that because of the untrustworthiness of the source of the information thereon (Fernald), as well as of the methods and circumstances of preparation, these documents did not come within the business records exception of the hearsay rule and should have been excluded as unreliable (Point I).

The prosecutor introduced what purported to be an eighteen-page summary (Gx 35) of the above documents. Assuming arguendo that the documents were properly in evidence, the "summary" should have been excluded because it was inaccurate, usurped the jury's fact-finding function and was misused by the prosecutor (Point II).

The prosecutor committed numerous acts of misconduct throughout the trial (e.g., introducing evidence of illegal street sales though this was neither charged nor relevant) and in summation which require reversal (Point III).

It will be contended that there was insufficient proof that the substances involved in the alleged sales were phendimetrazine or phentermine (Point IV) and that there was no proof of a fraud or misrepresentation within the meaning of Title 21, United States Code, Section 843[a][3] (Point V).

Various errors in the lower court's charge will be asserted, including inadequate and misleading instructions on the above two matters, whether Fernald was a co-conspirator, Pinkerton and aiding and abetting (Point VI).

Lastly, the applicable arguments of co-appellant's counsel will be incorporated by reference pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure (Point VI)

STATEMENT OF THE FACTS

Richard Leibowitz testified that he was an attorney with the Drug Enforcement Administration (DEA) and was familiar with the registration requirements of federal drug law. (273 - 275)*

On June 15th, 1973, phendimetrazine became a controlled drug; on July 6th, 1973, the same was true of phentermine.** From those dates forward, it was illegal to acquire these drugs unless one had first obtained a registration number from the Bureau of Narcotics & Dangerous Drugs (BNDD), the predecessor of the DEA. (275, 278 - 79) If one acted as a middleman, broker or "arranger", and arranged a sale of drugs from a manufacturer or supplier to a pharmacy, but never handled the drugs, the arranger need not be registered. (288 - 89)

Leibowitz testified on cross-examination that there

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*All numerical references are to the transcript of the trial (5/20 - 6/4/76).

**These are anoretic, or weight reducing drugs. (401)

Pastor who owned a group of pharmacies in Philadelphia, had contacts with doctors and clinics specializing in weight reduction there, and who purchased large amounts of anoretics. He talked to Pastor on the phone and they agreed to a sale of 100,000 phendimetrazine ("a small matter"). He flew to Philadelphia, met Pastor and appellant Weiner at the airport, and Weiner took the pills and put them in his car. With Weiner present, Pastor and Fernald talked about doing business in the future. Pastor said he was not interested in receiving invoices or signing receipts and that he would pay for the drugs in cash or certified check. Pastor then gave him $550.00 in cash and although Pastor had said he would not sign any receipts, he did initial a "piece of paper" Fernald gave him; unfortunately, this "piece of paper" could no longer be found by Fernald. (427 - 38)

Berry had previously told Fernald that in sales of "this nature", all billings were to be to the account of one "Dr. Horace Johnson" and Fernald has used the "Johnson" account with sales to other persons on other occasions. (437, 1032 - 34) Accordingly, when he returned to New York, he had an invoice prepared which was made out to "Dr. Horace R. Johnson, 709 South 19th Street, Philadelphia, Pennsylvania. (453 - 54)*

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*This invoice was one of a large series of documents purportedly admissible under the business records exception to the hearsay
(Footnote continued on next page)

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*This invoice was one of a large series of documents purportedly admissible under the business records exception to the hearsay
(Footnote continued on next page)

During May and June, 1973, there were several phone calls concerning a 500,000 phendimetrazine order.** Fernald flew to Philadelphia with the pills on or about June 12th and gave them to Pastor at the Hopkinson House where Pastor lived. Weiner was not present at this time. (469 - 79)

On June 23rd, 1973, Weiner came to New York and picked up 800,000 phendimetrazine pills. Fernald said he called Berry, told Berry that he had no "instructions" on how to bill the deal and Berry told him to bill it to Tristate.***

(Footnote contined)

rule. For each alleged sale to appellants, the prosecution was permitted to introduce Wingate invoices and shipping orders (some made out to "Dr. H. Johnson care of E. Pastor"). Vitarine invoices and shipping orders (when Wingate ordered from that company because it did not have stock), and Wingate's ledger book showing deposits to a "Johnson" account in the approximate amount and at the approximate time as the alleged sales. All of these were objected to on the ground that the ultimate source of information, Charles Fernald, was so untrustworthy that they did not qualify as business records. The court consistently overruled these objections and this issue is discussed in Point I.

**It was stipulated that Pastor and Weiner had certain phones listed in their respective names during 1973-74 and the prosecution introduced telephone company records showing numerous calls from Fernald to those numbers and vice versa. (376 - 79)

As none of these calls was recorded or otherwise overheard by anyone, Fernald was the only source of the contents of the discussions. Even he had to admit that he could not remember the contents of any one call. (970 - 71)

***This contradicts Fernald's testimony that Berry had previously told him to bill deals of "this nature" to the Johnson account. (437) When Berry testified, he denied telling Fernald to bill this deal to Tristate. (1570 - 73)

Fernald had an invoice prepared (#4574, Gx 9C) and it was sent to Tristate, but when Weiner received it he called Fernald and said it should not have geen sent to him but to someone else; Fernald admitted that the invoice had been sent "in error". (485 - 93, 1136 - 43) (On subsequent cross-examination, Fernald was confronted with an invoice for 1,000,000 phendimetrazine to Tristate and admitted this was a "buried" sales, i.e., the sale was to someone else and Tristate's name was put on it. (1144 - 45) During a recess between cross and re-direct examination, Fernald was permitted to consult with the prosecutor. (1147 - 48) When he re-took the stand, he changed his testimony and said the invoice had been prepared to cover a shortage, but when it was discovered that the shortage was due to a mathematical error, the invoice was cancelled and a "credit" was given. (1157)

On July 26th, 1973, Fernald said he delivered 100,000 phendimetrazine to Pastor at Pastor's apartment. He said Weiner had been present when these pills had been ordered at the initial meeting in May, but was not present at the delivery. These pills came from Wingate's inventory. (494 - 98) (On cross-examination, Fernald admitted that payment for this transaction was listed under a different invoice number than the sale invoice; he ascribed this to a "posting error". [1134 - 36]).*

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*This transaction represented the first substantive count, Count Two, on which the jury eventually deadlocked. (2397)

The next alleged transaction was a delivery of 2,000,000 phendimetrazine to Pastor at Hopkins House about August 10th, 1973. According to Fernald, Pastor called him several times in an attempt to return these pills because they were "undesirable", but Fernald would not take them back. The Wingate invoice Fernald said corresponded to this sale was dated June 1st, 1973; Fernald said he did this to put the transaction prior to control on June 15th, 1973. (On cross-examination, he was unable to explain why he had done this since the sale was within the two-month grace period for those with prior registration numbers, which Pastor had, and Fernald testified that Pastor was registered to deal in this drug throughout 1973 and 1974. [508 - 13, 1099]). The customer copy of this invoice carried the number 4480-A while the Wingate copy of this invoice carried number 4480; Fernald said it was "abnormal" for an invoice to have an "A" number and did not explain this "abornormality". Although he said payments for this transaction were made "over a period of time", on cross-examination, he conceded that his receipts book did not show any receipts for payment corresponding to this sale. (500 - 508, 1120 - 24)*

In the late summer of 1973, Pastor was buying directly from Berry's Danbury Pharmaceuticals at the same price

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*This transaction represented Count three, on which the jury also could not reach a decision. (2397)

Fernald was buying from Danbury. This meant that Fernald could not make any profitable sales to Pastor, so Berry suggested Fernald use the Garden-Vitarine (Vitarine) Company as a second source. Pastor ordered 250,000 phendimetrazine, Fernald placed the order with Vitarine and the pills were shipped in October, 1973 to "Dr. Johnson, care of Edward Pastor at his home address."* On October 22nd, Pastor paid Fernald in Philadelphia. (700 - 710)**

Fernald said he and Pastor had discussed another 2,000,000 phendimetrazine order and an initial 200,000 order was placed with Vitarine. Fernald subsequently called Pastor and said Vitarine needed the order to be on the stationery of a doctor with a current BNDD number. Several weeks later, Fernald received a letter on Dr. Horace Johnson's stationery ordering 200,000 phendimetrazine for six months. (711 - 17)

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*William Eversgerd testified that he had been the office manager of Vitarine in 1973 and 1974 and he contradicted Fernald on this invoice; he said it was to be sent to "Dr. Johnson c/o E. Pastor" but that "E. Pastor" had been crossed out and "North Allen Medical Center" (Dr. Johnson's address [1290]) had been written in. He testified that all of the information he put on the Johnson invoices came from Fernald. The only invoices he sent were to Wingate but it was perfectly normal for the receiver of pills to be someone other than the person to whom the transaction was billed. (319 - 32)

He testified that he had no personal knowledge of the contents of any of the boxes he shipped. (337) (Fernald testified the same, adding that since he was only an arranger, he was not permitted to open packages from any supplier or manufacturer. [113])

**This transaction represented Count Four on which the jury could not agree. (2397)

During the Fall of 1973, Fernald said Pastor called and told him to ship the goods via APA Transport because Pastor had a "connection" on the platform to expedite delivery. (718 - 19)*

On January 10th, 1974, Fernald received a Vitarine invoice showing the shipment of the first 200,000 order and he called Pastor. Shortly thereafter, APA called Fernald and said "they could not find Dr. Johnson at the address on the shipping label." When Fernald told Pastor about this, Pastor said he would take care of it and the package was subsequently picked up at APA. (719 - 24)**

On February 22nd, Fernald received the notification of the second 200,000 shipment and called Pastor. A few days later, APA again called Fernald and said they could not locate the "addressee". Fernald called Weiner, who said he would take care of it. Fernald later received payment from Pastor. (728 - 33)

A third shipment was made on March 15th, via a "Jeweler's" trucking firm (Fernald could not explain the change in shippers). They took the packages directly to the North Allen

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*It was the prosecution's theory that Pastor, posing as Dr. Johnson, had struck up a relationship with Edward J. Gallagher, who was in charge of shipments at APA's Philadelphia terminal. When Gallagher testified, however, he indicated that his earliest contact with Pastor was in early 1974. (1648) This discrepancy was never explained.

**It was the prosecution's theory that Pastor falsely used Dr. Johnson's name and old BNDD number to conceal his own purchases. Why Pastor would have been so foolish as to have packages sent directly to Johnson, with the attendant danger that the whole "scheme" would be blown, is difficult to understand. (791, 956)

Medical Center but Dr. Johnson was not there, so they were brought back to New York. Pastor was called and said he would take care of it. Fernald said he was paid by Weiner on March 26th. (733 - 38) Fernald was unable to explain why the invoice for this transaction was number 5352 while the payment he attributed to the deal was listed under invoice number 5432. (738 - 39)

On April 4th, Fernald received notification of the fourth shipment, but on April 18th, APA called and said the packages were still at the terminal. Fernald called Weiner and the merchandise was subsequently picked up. Fernald "believed" Weiner paid for this shipment. (743 - 46)*

The fifth shipment was made in June; delivery apparently went smoothly and Weiner paid him in July. (762 - 64)**

In April, 1974, Pastor had ordered 1,000,000 phentermine in two deliveries. Fernald told Pastor that Vitarine needed the order to be on the doctor's letterhead. Shortly thereafter, Fernald received a letter on Dr. Johnson's stationery

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*Fernald said that payment was made on April 15th and the invoice made out April 16th. He attempted to explain the invoice carrying a date of April 10th by saying he back-dated it, although this contradicted his earlier testimony that he waited for word the packages had been picked up before making the invoices. (732 - 33, 745) He was unable, however, to explain how payment and preparation of the invoice could have preceded the APA call (on April 18th) that the merchandise was still at the terminal!

**These five shipments constitute Count Five, on which Weiner was found guilty.

and placed the order. Deliveries were made in May and June, 1974. (748 - 62)*

Although offered as a co-conspirator in an illegal conspiracy, Fernald gave much testimony casting doubt on whether or not there was a conspiracy and, if so, whether he was a member of it.

Fernald testified that Pastor told him that he (Pastor) was buying these drugs for Dr. Johnson. (476, 711) Fernald also testified that Pastor told him that the fact that phendimetrazine and phentermine were under control was no problem because he had licenses to deal in them and because most of the pills were given to doctors who gave them away, so there was no reportage necessary. (706)**

On cross-examination, Fernald testified that although he was cooperating with the DEA during the period of these alleged sales to Pastor and Weiner, he did not tell the agents about them until July, 1974 and then only because he had been threatened with violating his probation because

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*These deliveries constituted Count Six on which Weiner was found guilty. (2397)

**Whether what Pastor told Fernald was true is not the point. The point is that if Fernald was a co-conspirator, it would have been ludicrous for Pastor to have been trying to legitimize these transactions.

of the sales.** He never taped any of his numerous calls with Pastor and Weiner*** and never told the DEA in advance of any of his meetings so they could be surveilled. (971, 1017, 1214, 1215)

At times, he claimed that his part in these transactions was wholly innocent because he believed Pastor and Weiner had licenses, and there was extensive colloquy on this matter because it conflicted with the prosecution's designation of Fernald as a co-conspirator and with the Government's entire theory of this case. (973 - 1014, 1067 - 86, 1225 - 27)****

Dr. Horace Johnson testified that he had known and had a business relationship with Pastor since 1962. (1287) He had used phendimetrazine (under the brand name Ionomin) in his practice and used to give thousands of pills away. (1287) He said he had never asked Pastor to order phendimetrazine or phentermine for him. The letters to Vitarine ordering such drugs were not on his stationery and were not signed by

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**Even at that time he lied, telling the agents that the sales had been directly to Johnson who had paid by check. (1026)

He said that he had "no firm understanding one way or the other" as to whether he was to tell the truth to the DEA (1189) and he admitted lying to the DEA in an attempt to save himself. (1203 - 04) He was never prosecuted for making false statements and his probation was never violated. (1026 -27)

***Contrast his taping of an incriminating phone call with Berry in January, 1974 as part of his cooperation. (1056)

****Ultimately, the court ruled Fernald was a co-conspirator (1997, 2057) and so instructed the jury. See Point VI for discussion of whether this issue was properly charged to the jury.

him. (1288 - 90)

He said that in 1973 and 1974 Pastor had offered to obtain caffeine pills for him. (1304)*

Douglas Berry testified that he had pleaded guilty to illegally selling phendimetrazine after control (in an unrelated case) and he received six months probation. (1364 - 65)** He said that in the period between March, 1973 and early 1974, he received several telephone calls at Danbury Pharmaceuticals from Pastor for orders of phendimetrazine, phentermine and caffeine; all of these went to Dr. Johnson, except one for Tristate. (1374 - 78)***

As a prior similar act, Berry was permitted to testify that Pastor and Weiner flew to Danbury about March, 1973, purchased uncontrolled drugs and Pastor paid in cash. (1383 - 90; these drugs were not for Dr. Johnson [1409]).

He never saw Weiner again although Weiner did call and order uncontrolled drugs for Tristate. (1390 - 91)

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*Several of Fernald's alleged sales to Pastor had involved caffeinamine which was a non-controlled substance apparently used interchangeably with phendimetraine and phentermine. (730, 745 - 49, 755, 767, 941 - 55, 1377 - 78, 1558)

**As with Fernald, Berry later asserted his innocence of the charge he had pleaded to as well as denying that any of his sales to Pastor or Weiner was illegal. (1413 - 45, 1542 - 45, 1548 - 50)

***All of this testimony was based on Berry viewing invoices and saying "I see dates of invoices here, dates shipped, so consequently, the orders must have been placed." He had no independent recollection of these transactions. (1371 - 72, 1374 - 75; See Point I)

Again, as a prior similar act, Berry was permitted to testify that Weiner once called him and asked him to remove a copy of an invoice from Danbury's Tristate file during a BNDD audit. Berry said he refused and Weiner said he was going to call Ira Sachs, the president of Danbury. When Berry later looked in the file, the invoice was not there, but when Berry looked at a subsequent time (with a DEA agent), it was there. (1394 - 98) On cross-examination, Berry admitted that Weiner had written to Danbury complaining that he had never received the shipment represented by that invoice and that Danbury had written to the shipper about this. [1399 - 1401, 2227]).

Thomas Crow testified that he was a DEA agent and had conducted an audit of Tristate in March, 1974. He had a copy of a Wingate invoice for 800,000 phendimetrazine,* but found no corresponding invoice in Tristate's files and Tristate's records showed the pills had never passed through the company. On cross-examination, Crow admitted that if Tristate never placed any order for these pills with Wingate, that could also explain the absence of any record in Tristate's files. (1580 - 1601).

Edward Gallagher testified that he was in charge of the APA Philadelphia Terminal in 1973 and 1974. After several

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*This was the invoice Fernald said had been sent to Tristate "by error". (485 - 93)

futile attempts to deliver packages to a Dr. Horace Johnson, he received a telephone call and was told to hold all further packages for pick-up. Some time in 1974 (between January and May), a person he identified as Pastor appeared at the terminal, said he was Dr. Johnson and made two pick-ups. Other persons made similar pick-ups after telephone calls. (1637 - 58) Weiner never made any of these pick-ups. (1658)

Joseph Vigna testified that he was a DEA agent and had interviewed Pastor in December, 1974 and February, 1974 at which time Pastor had admitted illegally acquiring drugs through the use of Dr. Johnson's BNDD registration. (1798 - 1802)

The Government rested (1871), motions to dismiss were made and denied (1872 - 1997), the appellants rested (2006), motions for directed verdicts were made and denied (2006 - 12), summations were had (2017 - 2252), the court charged the jury (2253 - 97, 2311 - 26, 2340 - 41, 2359 - 76) and the jury found appellants both guilty of Counts One, Five and Six and deadlocked on Counts Two through Four. (2397)

SENTENCE

On July 26th, 1976, appellant Weiner was sentenced to a suspended sentence, two years probation and a $3,000.00 fine.

STATUTE INVOLVED

Title 21, United States Code, Section 843, states in pertinent part as follows:

> "§843. Prohibited acts C - Unlawful acts
>
> (a) It shall be unlawful for any person knowing or intentionally --
>
> (3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge; . ."

POINT I

THE SOURCE OF INFORMATION AND THE METHOD AND CIRCUMSTANCES OF PREPARATION OF THE WINGATE AND VITARINE DOCUMENTS WERE SO UNTRUSTWORTHY AS TO RENDER THEM INADMISSIBLE UNDER RULE 803(6) OF THE FEDERAL RULES OF EVIDENCE.

The prosecution's case against appellant Weiner was based almost exclusively on the testimony of Charles Fernald.* In an attempt to corroborate Fernald, the prosecution introduced a large number of documents purportedly under the "business records" exception to the hearsay rule. A careful examination of the "source of information. . .[and] the method [and]. . . circumstances of preparation indicate [such a] lack of trust-

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*With regard to appellant Pastor, there was other, albeit highly suspect, evidence concerning his identification by Gallagher and his confession to Agent Vigna.

Douglas Berry also gave some minimal "similar act" testimony against Weiner.

worthiness" that the documents do not qualify under this exception and should have been excluded. Their admission, therefore, was error and under the circumstances of this case, requires reversal.

Fernald testified about a number of meetings and telephone calls between approximately May, 1973 and July, 1974 involving appellants Pastor and/or Weiner relating to the purchase of phendimetrazine and phentermine. He was forced to admit, however, that he did not have a single shred of objective proof that these meetings or phone calls occurred: no pictures of himself with either appellant, no surveillance testimony by DEA agents, no tape-recorded conversations, etc.*

To overcome this obvious deficiency in its proof, the prosecution secured the admission into evidence of certain documents designed to show that Fernald was telling the truth when he said that he and appellants conspired to, and did, obtain the above named drugs via the use of the expired BNDD number of one Dr. Horace Johnson. These documents, in the main, consisted of order and shipping forms and invoices for the sale

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*Fernald did testify that Pastor initialed a "piece of paper" (not a receipt) at the time of the alleged delivery of the first pills, but Fernald could not now locate that paper in his files.

Fernald also admitted tape recording a phone call to Douglas Berry as part of his cooperation with the DEA. Although many of the instant sales alleged to be illegal took place during this cooperation, Fernald never taped either Weiner or Pastor's alleged calls to or from him and never notified the DEA of any of his alleged meetings with these men so that they might be observed.

of these drugs to "Dr. Horace Johnson c/o Edward Pastor" (Gx 7-21); a ledger book showing deposits to a "Johnson" account was also introduced. (Gx 23a)

Defense counsel strenuously objected to the introduction of these documents, offered under the business records exception to the hearsay rule, on two grounds: Firstly, that the ultimate source of the information on the documents, Charles Fernald, was untrustworthy and, secondly, that the methods and circumstances of preparation of the documents were also untrustworthy.*

Fernald himself was clearly untrustworthy. By his own admission, he had pleaded guilty to one illegal conspiracy involving controlled drugs and had been engaged in numerous other conspiracies and sales of such drugs. He admitted lying to the DEA both before and after his plea and of attempting to disguise his involvement in the instant case. He admitted making out other invoices to phony accounts (using Dr. Johnson's name) to cover and bury sales unrelated to this case.** He

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*All of the Vitarine exhibits were inadmissible for an additional reason: They all contained handwritten notations, erasures and changes. (313) Eversgerd was unable to testify as to when or by whom these markings had been made and, accordingly, the documents should have been excluded. United States v. Halperin, 441 F.2d 612, 618-19 (5th Cir., 1971).

**Even under Section 1732, this "motive to misrepresent" would probably have required exclusion. Hoffman v. Palmer, 129 F.2d 976, 981 (2nd Cir., 1942), aff'd. 318 U.S. 109 (1943). This was because it was a "prerequisite. . .of admissibility. . . that the circumstances of the making of the record are such that accuracy is not merely probable, but highly probable. United States v. De Georgia, 420 F.2d 889, 894-95 (9th Cir., 1969).

admitted agreeing with Berry that if he was ever caught he would just say that certain unreported transactions were for "cash" as he testified here. He was continuously unresponsive and evasive when cross-examined by defense counsel. The "method and circumstances" of preparation of these documents were also untrustworthy.

With regard to the Wingate documents, Fernald would give the information to a bookkeeper and invoices would be prepared or ledger entries made; with regard to the Vitarine documents, Fernald would give the information to Eversgerd directly or Eversgerd would take it off Wingate forms which, once again, were based on Fernald's information. Additionally, Wingate's record keeping was atrocious and based totally on the whim and caprice of Fernald.

Fernald testified that he had no idea how long after he gave information to a secretary or bookkeeper that the document containing this information was prepared. (419) Two of the invoices contained the letter "A" after the regular number; Fernald described these as "abnormalities" but was totally unable to explain them. There were numerous "posting errors", e.g., an invoice for a 1973 sale would have a number corresponding to a 1974 invoice series, an entry in the cash receipts book would refer to an invoice number different from the number of the invoice supposedly representing that sale, there were no entries in the cash receipts book for monies

Fernald swore he received, etc.

Even more bizarre was Fernald's habit of wholly making up invoices or conforming the information on them to his needs. When an inventory count (later shown to be erroneous) showed a 1,000,000 unit shortage, he simply made up an invoice to Tri-state for that amount. He pre-dated, back-dated and simply mis-dated invoices as the spirit moved him. In trying to explain why an invoice for one of the 200,000 pill Vitarine shipments was dated weeks after Vitarine had shipped it, he said he would wait until he had "heard" that the shipment had been picked up and then make out an invoice. When confronted with an invoice for another shipment that was dated before Vitarine even shipped that installment, he said it had been "pre-dated". The term "crazy guilt problem" applies to all of these documents.

The trial court ruled that all of the foregoing went not to admissibility, but to the weight the jury might give to the documents. This was error. The rule that the untrustworthiness of a source of information or the method of preparation of a document went to weight and not admissibility was the prevailing rule under Title 28, United States Code, Section 1732(a)(2):

> "All other circumstances of the making of such writing. . .may be shown to affect its weight, but such circumstances shall not affect its admissibility."

See, e.g., United States v. Ellenbogen, 365 F.2d 982, 987-88

(2nd Cir., 1966). Rule 803(6) of the Federal Rules of Evidence, however, has replaced Section 1732(a).*

Rule 803(b) reads as follows:

> "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and it it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified withness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

It is clear that 803(6) has "substantial[ly] change[d]" the former business record exception rule. Rothstein, Understanding the New Federal Rules of Evidence, at 62 (1974 Supp.). Of particular relevance to our purposes is the fact that the circumstance of the making of documents has now become an issue of initial admissibility, not of weight for the jury. See, Notes of Advisory Committee on Proposed Rules (set out at pp. 584-595 of 28 USC, Federal Rules of

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*Public Law 93-595 established the Federal Rules of Evidence. Section 2(b) of P.L. 93-595 struck 28 U.S.C. §1732(a), the old business records rule and substituted Rule 803(6) in its place. See, 94 U.S. Code, Congressional & Administrative News 2251, 7091.

Evidence) at 588-89:

> "[T]he rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if 'the sources of information or other circumstances indicate lack of trustworthiness'."

In Gaussen v. United Fruit Company, 412 F.2d 72 (2nd Cir., 1969), this Court seemed to recognize the difference between §1732 and the then-proposed Rule 803(6):

> "[I]t is clear that under the Business Records Act, 28 U.S.C. §1732, circumstances relating to the maker of the record are relevant only to the weight of the evidence, not to its admissiblity."
>
> * * * *
>
> "We believe that the admissibility of such a report depends upon whether it was made in the regular course of appellants' business and is based upon information transmitted in such regular course by a person with knowledge, and whether the circumstances otherwise indicate the trustworthiness, or lack of it, of the report, determinations the trial judge is in the best position to take. Cf. Preliminary draft of Proposed Rules of Evidence for the United States District Courts, pp. 188-90." (Id. at 73, 74; emphasis added).

Although concurring in result, then Circuit Judge Kaufman (now Chief) chided the majority for relying on the proposed rules because they "depart so radically from the current law", i.e., §1732 (Id. at 74, n.1).

An even clearer statment of the change wrought by the new rule appears in United States v. Robinson, --- F.2d ---,

(2nd Cir., October 29th, 1976), sl. op. pp. 333, 340-41. That case dealt with a related hearsay exception (803[10]) but the observations of Judge Meskill are fully applicable to 803(6):

> "Evidence that is otherwise admissible under an exception to the hearsay rule is admissible primarily because evidence of that kind is generally trustworthy, but if, in a particular instance, the circumstances indicate a lack of trustworthiness, the evidence should be excluded. See, United States v. De Georgia, 420 F.2d 889, 895-95 (5th Cir., 1969) (Ely, J. concurring). The question of trustworthiness is a crucial threshold issue of law going to admissibility, and it must be resolved first by the trial judge before it becomes a question of weight for the jury."

United States v. Robinson, --- F.2d --- (2nd Cir., October 29th, 1976), sl. op. pp. 33, 340-41.

Since it was clearly demonstrated that these records were untrustowrthy both because of their source and the way in which they were prepared, they should never have been admitted. United States v. Robinson, supra. Since they provided the only corroboration of Fernald (at least as to Weiner), their introduction cannot be deemed harmless error and there must be a reversal and a new trial.

POINT II

THE ADMISSION AND USE OF GOVERNMENT EXHIBIT 35 CONSTITUTED REVERSIBLE ERROR.

During the testimony of DEA Agent Vigna, the last prosecution witness, Government Exhibit 35 was offered into

evidence. Although the prosecutor initially claimed that Government Exhibit 35 was nothing more than a "list of exhibits", it soon became clear that it was something quite different:

> MR. TIMBERS: [The prosecutor] Well, its a little -- its a little more than a list, your Honor. Each page is devoted to a transaction in the case and for each transaction in the case there is a list of invoices from Wingate and Garden (Vitarine), the entries in the Wingate books, the relevant telephone calls." (1736)

Both defense counsel objected strenuously and on a variety of grounds: They claimed the exhibit inaccurately recounted testimony in addition to documents; highlighted favorable portions of the documents while omitting impeaching testimony and disputed documents; contained editorial commentary and was, in effect, a "second class summation." (1736 - 45)

The prosecutor responded that he had a right to summarize <u>evidence</u> as well as exhibits and that the chart was accurate. (1745 - 48)*

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*Actually, the prosecutor all but conceded that there were errors in Government Exhibit 35, but said that counsel had waived them by not telling him about their objections beforehand. Both counsel said that they had objected to the entire exhibit from the beginning. (1745 - 50)

The lower court ruled that use of the exhibit was limited to the proscutor's summation, unless the prosecutor could cite authority for its introduction. (1751) The prosecutor called his office and then cited Rule 1006 of the Federal Rules of Evidence and two cases (United States v. Cummings, 468 F.2d 272 [9th Cir., 1972] and United States v. Ellenbogen, 365 F.2d 982 [2nd Cir., 1966]). Defense counsel argued that Rule 1006 was inapplicable because it only applied where other evidence was so voluminous it could not be admitted and that the cases were distinguishable. (1752 - 59)

The court then reversed its position and admitted the exhibit. (1760) This was error. The lower court specifically ruled that Government Exhibit was admissible under the authority of Rule 1006. (1760, 1779) However, Rule 1006 requires that for a summary to be admissible, the documents which underlie it must be admissible under the rules of evidence, but not admitted because of inconvenience. Accordingly, if this Court agrees that the invoices, etc. were improperly admitted (See Point I), then Government Exhibit 35 is inadmissible because based on hearsay; alternatively if this Court rules that the invoices were properly admitted, then Government Exhibit 35 is inadmissible because the documents it is based on are themselves in evidence.

A prerequisite to admissibility under Rule 1006 is that the materials upon which the summary is based are,

themselves, admissible:

> "Thus, if the original materials contain hearsay and fail to qualify as admissible evidence under one of the exceptions to the hearsay rule, the chart, summary, or calculation based on that material is inadmissible."

5 Weinstein's Evidence, ¶1006[03] at pp. 1006-6.

If this Court agrees with the arguments set forth in Point I, and holds that the invoices, etc. were too unreliable to be admitted as exceptions to the hearsay rule, then Government Exhibit 35, being based on those documents, is itself inadmissible.

Assuming arguendo that the exhibits on which Government Exhibit 35 was based were properly admitted, then for precisely that reason Government Exhibit 35 was also inadmissible. Rule 1006 allows a summary to be introduced where "The contents of voluminous writings. . .cannot conveniently be examined in court." (Emphasis added) In this case, of course, all of the documents upon which Government Exhibit 35 was based had been examined in court and were themselves in evidence.

Prior to the passage of Rule 1006, the admission of summaries such as Government Exhibit 35 was determined in the exercise of the trial court's discretion. Recognizing the possibility of abuse, the drafters of Rule 1006 intended to permit the introduction of summaries in only "one limited set of circumstances" (Rothstein, Rules of Evidence for the United

States District Courts & Magistrates (Clark Boardman at 445), and "with appropriate safeguards" (Advisory Committee's Note to Rule 1006, set forth at 5 Weinstein's Evidence, ¶1006-01 [at pp. 1006-2]). The "one" situation is where the other documents are not in evidence and the most important safeguard is that they be too voluminous to be put in evidence.* It must be noted that even if all of the prerequisites for admissibility of a summary are met, Rule 1006 only says such an exhibit "may" be introduced; in other words, there is no discretion to be exercised in favor of admission, only in favor of exclusion.

Neither Ellenbogen nor Cummings is contrary to this rule. In Cummings, the underlying documents had not been admitted and were too voluminous to be admitted (468 F.2d at 278-80). Ellenbogen is a pre-Rule 1006 case dealing with a discertion which no longer exists (365 F.2d at 988).**

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*That the originals may be made available to the opponent and that some of the originals may be offered by the opponent to challenge the summary, does not justify the introduction of the summary where the proponent has put all of the originals in evidence. Weinstein, supra at ¶1006[2].

**Ellenbogen is distinguishable on another basis and that is that it was one of a series of cases which held that summaries were inadmissible unless the underlying documents were also admitted. See, also, McDaniel v. United States, 343 F.2d 785 (5th Cir., 1965); Melinder v. United States, 281 F.Supp. 451 (W.D. Okla., 1968). As Judge Weinstein has pointed out, Rule 1006 has reversed this requirement and these cases are no

(Footnote continued next page)

Putting aside the documentary objections, a close examination of the way in which Government Exhibit 35 was prepared and of the exhibit itself demonstrates that it is not the sort of thing contemplated under Rule 1006.*

Agent Vigna testified that he was only able to match invoices and telephone calls to specific transactions by relying on the testimony of Charles Fernald.** For example, since he did not know who made or received any of the telephone calls in the prosecutor's exhibits, nor what was said during any of those calls, he matched calls to transactions based on Fernald's testimony. (1761 - 64, 1768 -72) Although certain cashbook entries referred to invoice numbers different from the Wingate

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(Footnote continued) - longer good law. 5 Weinstein's Evidence, ¶1006[02] at pp. 1006-5.

Even if the above portion of the Ellenbogen case has not been changed by Rule 1006, an earlier portion of the decision supports the argument against admissibility. The court first had to uphold the admissibility and admission of the documents which underlay the summary in Ellenbogen (365 F.2d at 987-88), whereas, as noted above, the underlying documents here are inadmissible.

*Rule 1006 was designed to permit the introduction of charts reflecting labor statistics, public opinion polls and the like. Rothstein, Understanding the New Federal Rules of Evidence (1975 Supp.) at 502.

**Counsel succinctly stated his objection that Government Exhibit 35 was an attempt to strengthen Fernald's testimony by "reduc[ing it] to tangible evidence on the theory I guess that people will tend to accept what they read more readily than what they hear." (19736) It should be noted that Government Exhibit 35 was the first thing the jury asked for. (2347)

sales invoices, he ascribed them to the same trans ction because of Fernald's testimony. (1765 - 67, 1773 - 79)

Furthermore, the document itself contained improper comments, inferences and characterizations. Under the column labelled "Documentary Evidence", the "Johnson" account is referred to in quotation marks; presumably this implied that it was a phony account, although none of the "documentary evidence" supports this implication. (Gx 35 at 1, 2, 4, 6 [cont'd.], 9, 11, 13, 14, 15 [cont'd]). Tristate Pharmacy is always referred to as "Weiner's Pharmacy", although Weiner's connection with Tristate was not shown to be one of ownership." (Id. at 2, 6, 8, 9, 10, 11, 12, 15). Where sales invoice numbers do not match ledger invoice numbers, no mention is made of that fact and the ledger invoice number is conveniently omitted. (Id. at 4, 5, 8, 9) Where the information on an exhibit either did not correspond to the transaction it was placed uner or was deemed insufficient to convey whatever message the prosecution wanted the jury to receive, references to testimony of witnesses was added by way of explanation. (Id. at 5, 11, 15)

Other editorial comments were interspersed: The jury was told to look on other pages for "identical entr[ies]". (Id. at 6, 7, 11, 12, 14, 15); Government Exhibit

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*Contrast Pastor's pharmacies which were named "Pastor Pharmacy."

13f and 18e were referred to as letters "purportedly" signed by Dr. Johnson (Id. at 7, 12,) etc.

Rule 1006 permits the summarization of documents, not the interpretation of documents based on testimony:

> "Charts, summaries, or calculations are inadmissible if they contain information not present in or computed from the original or duplicate materials on which they were based."

5 Weinstein's Evidence, ¶1006[03] at pp. 1006-6

Even under pre-Rule 1006 law, Government Exhibit 35 would have been rendered inadmissible by all of the errors and interpretationsit contained.

In United States v. Flynn, 481 F.2d 11, 13 (1st Cir., 1973), the exclusion of charts was upheld because:

> "Careful analysis shows the charts to have been fallacious, as containing items not supported by the evidence. . ."

In United States v. Kohlman, 469 F.2d 247, 252 (2nd Cir., 1972), charts containing mental classifications of the American Psychiatrict Association were held admissible where it was not contended that the charts were "inaccurate".

Lastly, in United States v. Ellenbogen, supra, the admission of a chart was upheld, but with language which would mandate reversal here. One DiChellis had admitted putting false information on bid records to make it look as though Ellenbogen had the lowest bid and the chart reflected this. This Court noted, however:

> "If DiChellis had admitted that he had falsified the records of purchase orders to indicate that Ellenbogen had been

> awarded orders when he had not, the chart could indeed have injured the defendant. In that circumstance, it might have been possible for the jury to accept the conclusion in the chart and forget that some of the evidence was to the contrary." (Id. at 988)

This is precisely the case here. Fernald admitted making sales using Johnson's name to persons other than appellants and to making other false invoices to appellants and others, but nowhere did this contrary evidence appear in the chart.

Assuming, without conceding, that the admission of Government Exhibit 35 was not error, its use at the trial was.

Over the objection that the exhibit "spoke for itself" (1781), the prosecutor was permitted to have Agent Vigna recount all of the documentary support for he transactions set forth in the indictment (1781 - 96), thereby restating Fernald's testimony in a pre-summation summation. In his own summation, the prosecutor revealed his true purpose for putting Government Exhibit 35 into evidence. The first thing he did was pass Government Exhibit 35 among the jurors. (2016) He spent a large part of his summation taking the jury through Government Exhibit 35 page-by-page. (2028 - 40, 2044 - 52) He referred to them as "dynamite evidence" (2044) and closed his summation as follows:

> "I thank you very much for sharing with me and going through these charts. I encourage you when you retire to the jury room, if you have any question about the case, to

> ask for these charts. As you know, you are entitled to see any evidence that you want and the charts or anything else if you request it.
>
> I submit to you that the charts are very powerful evidence that show the defendants did exactly what Fernald and Berry said they did." (2052)

The prosecutor returned to the use of Government Exhibit 35 as he began his rebuttal summation (2186 and spent much of his rebuttal going over the chart. (2222 - 30, 2238 - 43)

Immediately after the Court's charge, the jury made its first request - for Government Exhibit 35! The prosecution's misuse of Government Exhibit 35 was clear and pervasive. It was admitted solely as a summarization of other documents and did not constitute independent evidence - yet the prosecutor referred to it as "powerful" and "dynamite" evidence and the jury immediately accepted his invitation to use it.*

Assuming that any jury, in the face of the prosecutor's tactics, could have adhered to limiting instructions, this jury's immediate request for Government Exhibit 35 shows that that did not happen here. Accordingly, there must be a reversal and a new trial. Bruton v. United States, 391 U.S. 123 (1968).

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*The jury's immediate request for Government Exhibit 35 is the clearest showing that the court's brief limiting instructions (2064 - 70, 2276 - 77) had no effect. The court itself recognized the prosecutor's error (2053 - 54) but also recognized its limited ability to cure such errors. (1175, 2249)

POINT III

THE MISCONDUCT OF THE PROSECUTOR, BOTH DURING THE TRIAL AND IN SUMMATION, REQUIRES A NEW TRIAL.

Against the background of the Supreme Court's admonition in Berger v. United States, 295 U.S. 78 (1935), that the prosecutor in a federal criminal case has a special obligation to see that "justice is done", we ask this Court to examine the actions of the prosecutor in this case.

A. TRIAL MISCONDUCT

The thrust of the Government's case was that appellants illegally acquired certain controlled substances. Although the issue of the distribution of such substances was, therefore, irrelevant to this case, the prosecutor insisted on inserting it in several ways.*

The prosecutor first injected this issue into the case during his opening statement. He told the jury that the substances phendimetrazine and phenterime had "legitimate

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*It is true that the indictment contains two references to "distribution" in the conspiracy count, but there was no actual proof of distribution nor any substantive counts charging either distribution or possession with intent to distribute under 21 USC §841. The absence of this issue from the case may be seen from the fact that the jury was never charged on distribution or §841.

purposes" but, also, a "potential for abuse." (254 - 55) By these references, he raised the implication that appellants had acquired these drugs so as to exploit this "potential". He made the implication explicit when he told the jury that the "five million units could be sold on the street for a dollar apiece." (257) All of this was done over rigorous objection by counsel. (255, 257 - 58)

Although the Government conceded that "the eventual disposition of the drugs is not an element of the crime" and that the Government would "not attempt to prove what happened to these drugs" (262 - 63), it would return to this non-issue again and again.

The very first witness was permitted, over objection, to lecture the jury on the anti-diversion regulations of the DEA although this was irrelevant to the case. (276, 277, 278). The prosecutor's last witness was a DEA agent who testified that the "street value" of these drugs was one dollar. (1796 - 98)

The prosecutor opened his summation by saying:

> "I am sure that you recognize the seriousness of the large amount of drugs that are charged in this case - five million units of phendimetrazine and phentermine altogether - and you heard Agent Vigna testify that when diverted to illegitimate street use those pills and capsules and tablets sell for a dollar apiece or a total of five million dollars.
>
> I won't dwell any further on the seriousness of the charges in this case during my summation." (2017 - 18, emphasis added)

Unfortunately, the prosecutor was not true to his word for a few pages later, he returned to this non-issue:

> "You will also recall that although the Government need not prove the distribution of these drugs, since the crime is acquiring drugs by misrepresentation, there is a strong indication that it was Mr. Weiner who actually did subsequent distribution on the occasion at the Philadelphia Airport when the drugs go into Mr. Weiner's car.
>
> On the occasion of one of the deliveries in the basement of Hopkinson House, Mr. Pastor tells the attendant to put the drugs in Weiner's car. It appears that the drugs were placed in Weiner's car for the subsequent distribution. However, that is somewhat of an aside because the crime is acquiring drugs by misrepresentation and there is no need to prove the actual distribution of them afterwards." (2027 - 28; emphasis added)*

And, again, a few pages later:

> "Berry was also able to tell you that Weiner called Berry up at the time that Weiner's pharmacies were buing audited and said 'Will you pull that invoice that says controlled drugs are shipped to Tristate,' the understanding implicit behind that conversation is when the DEA audits my records they are going to find those drugs aren't in my inventory and if you have got an invoice showing the drugs went to Tristate that is going to cause trouble because the DEA is going to

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*Rather than supporting the sinister connotation put on it by the prosecutor, the placing of the packages in Weiner's car merely shows that whatever was going to be done with them was going to be done somewhere other than the Hopkinson House garage or the Philadelphia Airport.

wonder where those drugs are going. And I think it's a fair inference that the place those drugs went is where all the drugs in this case went. They were diverted to some illegitimate use.

Just so we are all clear on this, that invoice that Mr. Weiner asked Berry to pull from the Danbury files is not an invoice involved in the transactions in this case. It's an invoice involving drugs from Danbury which they ordered from Tristate but apparently diverted by Weiner. And the government proves that only to show these are not isolated instances, but a pattern and course of conduct by Weiner and when Weiner is paying for these drugs in cash and making long trips he's not doing it innocently, but this tends to show his intention was to divert the drugs." (2042 - 43; emphasis added)

Defense counsel objected as follows:

"MR. COOPER: There are two other objections I have which I will state briefly to the Court. First, your Honor, we ask for a curative instruction. At the very beginning of Mr. Timbers' summation he remarked as to the seriousness of the charge and indicated the jury can find it was serious because of the amount of money which Agent Vigna testified the pills could bring on the street.

When that evidence was introduced, we approached the bench and Mr. Timbers assured the Court that it was only introduced to show a possible motive on the part of the defendants, the fact that the pills, at least according to Agent Vigna are a dollar a pill on the street.

Now, he is using it to inflame the jury and to say it shows how serious the crime or the alleged crimes actually are. If that was his intent in introducing it, I don't think it should have been introduced at all. It's only prejudicial and inflammatory and doesn't have anything to do with any elements of the crime.

What we request is that a curative instruction to the jury at this point be given that that testimony is not introduced for that purpose at all." (2054 - 55)

The prosecutor represented that the introduction of "street value" was in regard to the alleged motive of the appellants; his use of it to demonstrate the "seriousness of the crime" shows that what he was really doing was asking the jury to convict appellants because they were big time "drug dealers". This reference to other, uncharged crimes was reversible error. United States v. De Dominicis, 332 F.2d 207 (2nd Cir., 1964); Cf. United States v. Glaziou, 402 F.2d 8, 16 (2nd Cir., 1969); (proof of value of heroin permissible only when relevant to some issue in case).*

Another error occurred when the prosecutor attempted to rehabilitate its star witness, Fernald, but at a bench conference, the court ruled the attempt improper. In a completely improper manner, the prosecutor then said, in open court:

> "I have no further questions at this time, but I would make the caveat that there was an area that I did want to go into that I haven't been permitted to." (1232, emphasis added)

The court agreed with defense counsel that the prosecutor "shouldn't be making statements like that." (1232)

It is "black letter law" that to suggest to a jury

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*In addition to being an improper reference, the prosecutor's diversion theory was also unfounded. In view of testimony that Pastor was trying to encourage sales of generic drugs and that many physicians received these drugs as samples and gave them away, the prosecutor's claim that the distribution here must have been to illegal street sales was wholly unwarranted.

that the prosecutor knows of facts not shown to the jury is "strictly forbidden." United States v. Sawyer, 347 F.2d 372, 373 (4th Cir., 1965).

In Berger v. United States, 295 U.S. 78, 87 (1935), the Supreme Court reversed a conviction because, in attempting to explain the unfavorable testimony of a prosecution witness, the prosecutor gave the following explanation of how he had been prevented from asking certain questions by "the rules of law:"

> "Well, it is the most complicated in the world. I was examining a woman that I knew knew Berger and could identify him, she was standing right here looking at him, and I couldn't say 'Isn't that the man?' Now, imagine that! But that is [sic] the rules of the game and I have to play within those rules."

In Kitchell v. United States, 354 F.2d 715, 719 (1st Cir., 1965), the court said it was impermissible for the prosecutor to state that he had not been able to introduce certain testimony because "There are certain rules of evidence. . .about what the Government can introduce."

And in Songer v. State, 464 P.2d 763, 766-67 (Okla., 1969), the court condemned as "improper" the following statement by the prosecutor:

> "Law enforcement today is shackled and handcuffed by many rulings that won't let prosecutors show you and prove to

you many things that we know. . ."*

A s ngle remark (even one possibly not heard by the jury) can constitute non-harmless error requiring reversal. Stewart v. United States, supra, 366 U.S. at 7. This is because:

> "In considering the impact of what is said the court also must be concerned with the great potential for fury persuasion which arises because the prosecutor's personal status and his role as a spokesman for the government tend to give to what he says the ring of authenticity. The power and force of the government tent to impart the implicit stampt of believability to what the prosecutor says. That same power and force allow him, with a minimun of words, to impress on the jury that the government. . ., apart from the orderly machinery of the trial, knows that the accused is guilty or has non-judicially reached conclusions on relevant facts which tend to show he is guilty."

Hall v. United States, 419 F.2d 582, 594 (5th Cir., 1969).

Insinuations by a federal prosecutor that there is non-record proof of guilt "effectively circumvent. . .the rules of evidence" and threaten the impartial administration of justice that the federal prosecutor is supposed to uphold. Vess,

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*The court held that reversal was not called for despite this remark, because the evidence of guilt was so strong that the appellant had made no claim of insufficiency, because the court admonished the jury to disregard the remark and because, since the jury imposed the minimum possible sentence, it did not appear they were prejudiced by the remark. By contrast, in the instant case, the proof of appellants' guilt is quite weak, no cautionary instructions were given, and since the jury did not impose the sentence, that indication of the absence of prejudice did not appear.

Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument, 64 J.Cr.L. & Crim. 22, 28-29 (1973). And, despite repeated admonitions by the courts and a "stinging denunciation of prosecutor tactics" made by Dean Roscoe Pound in 1930, the federal prosecutor of today "frequently behaves egregiously during trial. . .disgracefully at worst." Singer, Forensic Misconduct by Federal Prosecutors and How it Grew, 20 Ala.L.Rev. 227 (1968).

The prosecutor's comments here constituted prejudicial error and there must be a new trial.

B. MISCONDUCT IN SUMMATION

Two of the errors in summation have been discussed previously. In Point II, the prosecutor's misuse of Government Exhibit 35 was covered and in Point III-A, the prosecutor's improper distribution and street value references were condemned. Three further areas will be discussed below.

The prosecutor mis-stated the evidence on several occasions. Three of the most important occurred in the "rebuttal" summation.* Firstly, the prosecutor stated that Pastor had offered to "cooperate". (2205) Counsel objected to the "cooperation" reference and the court said, "I think he may

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*Although Pastor was the subject of these mis-statements, it must be remembered that this was a conspiracy trial and anything used against Pastor also hurt appellant Weiner.

be talking about another proceeding." (2205) After the summation, counsel requested that the court tell the jury that there was no evidence of this and they should disregard it; the court refused, saying "That kind of thing is not cured by telling the jury to disregard it. . .It only emphasizes it." (2247 - 49)

Secondly, the prosecutor said that Pastor had no "license", i.e., BNDD registration number, "So any sale to Pastor after June 15th was illegal so far as Pastor and Weiner were concerned." (2218) This was directly contrary to the testimony of Elizabeth Barrett that DEA records show both Pastor and Weiner had licenses to deal in all classes of drugs during this period. (1250 - 51) Thirdly, the prosecutor said that appellants had "changed the theory of the defense" from what they had said in their opening statement. (2189)

The prosecution's "cooperation" reference directly implying a further admission of guilt by Pastor, was clear and reversible error. United States v. Grunberger, 431 F.2d 1062 (2nd Cir., 1970). See, also, United States v. Guajardo-Melendez, 401 F.2d 35, 40 (7th Cir., 1968); Corley v. United States, 365 F.2d 884, 885 (D.C. Cir., 1966). The trial court's reference to "another proceeding" actually compounded the error by implying that the statement was true and by permitting the jury to think that Pastor was involved in some other case. United States v. Guglielmini, 384 F.2d 602, 606 (2nd Cir., 1967). Since counsel requested a curative instruction, the court's refusal to do this because it might hurt the defendants

was gratuitous and in error. The usual instruction that the jury's recollection governs does not cure this error. United States v. Persico, 349 F.2d 6, 8-9 n. 7 (2nd Cir., 1965).

The prosecutor's statement that Pastor had no license was also harmful error. Counsel had argued that since Pastor and Weiner had BNDD licenses, there was no need for them to use Dr. Johnson's name. The prosecutor's mis-statement cut the heart out of this defense and requires reversal alone and certainly in cumulation with all of the other errors. United States v. Grunberger, supra.

Related to this error was the prosecutor's statement that the attack on Fernald was the "Latest attempt by the defendants to come up with a story that will explain away 'the government's proof.' " (2189) Citing a passage in Pastor's opening that there would be proof that he had all the necessary licenses, the prosecution improperly stated that this meant the defendants had said they would prove that defendants purchased the disputed drugs for their pharmacies. (2189 - 90)* Defense counsel objected on the ground that the reference to Pastor's license was not to show that he made these purchases, but that if he had wanted to, he would not have had to use Dr. Johnson's BNDD number; counsel argued that the prosecutor's statement

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*At this point, the trial court refused a bench conference request saying "I haven't heard anything so far which requires a bench conference." (2189)

gave the impression that the attack on Fernald "was something thought up at the last minute." (2246 - 47) The prosecutor's comment was reversible error because it was wholly unsupported by the record.

The prosecutor also committed error by improperly vouching for Fernald and Berry:

> "What does the government do? It attempts to determine by independent sources whether these people that are testifying for it are telling the truth because it sponsors those witnesses.
>
> I won't go through everything the government has done to confirm whether Mr. Fernald is telling the truth, because its all before you in those charts." (2210)*

It is reversible error to sponsor a witness or vouch for his credibility because it puts the prestige of the prosecutor behind that witness. Berger v. United States, supra; United States v. Martinez, 466 F.2d 679, 683 (5th Cir., 1972). ("Nor can a prosecutor vouch for a witness by suggesting that the government would not use a witness unless his credibility was confirmed.")

Lastly, the prosecutor improperly implied that the defense had an obligation to produce evidence and had failed to do so:

"If Mr. Goldman thought that he could prove

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*Objection to this statement was overruled. (2250 - 52)

> that APA was holding those drugs you can be sure that he would have had documents, witnesses or what-have-you in here to show that those drugs were held.
>
> Mr. Goldman has the same power of subpoena to get documents in here as the government does. He didn't produce the evidence to show that these drugs were held." (2234)

In a related statement, he reversed this attack and delivered a veiled reference to Pastor's right to remain silent:

> "And you know that Mr. Goldman has the right, if there was evidence of this, Mr. Goldman has the right to bring those documents in here and although Mr. Pastor doesn't have to take the stand, if those transactions did take place you can be sure he would have told Mr. Goldman about those transactions and they would have had those invoices in here to show you." (2237)

There was no objection to these blatantly improper statements, but that is irrelevant because nothing could possibly have cured the damage done. They constitute reversible error and there must be a new trial. United States v. Grunberger, supra; Cf. United States v. Flannery, 451 F.2d 880 (1st Cir., 1971).

POINT IV

THERE WAS INSUFFICIENT EVIDENCE FOR THE JURY TO FIND BEYOND A REASONABLE DOUBT THAT THE SUBSTANCES INVOLVED IN THIS CASE WERE PHENDIMETRAZINE AND PHENTERMINE AND THE COURT'S CHARGE ON THIS ISSUE WAS WHOLLY INADEQUATE.

Counts five ans six, of which appellants stand convicted, charged them with possession of, respectively, phendimetrazine and phentermine. It is submitted that the prosecutor

evidence, which was wholly circumstantial, was insufficient to permit the jury to find beyond a reasonable doubt that the above drugs were what was sent, and allegedly received by, appellants.

It must initially be noted that Counts five and six involved packages sent from Vitarine and Mr. Eversgerd of that company testified that he had no personal knowledge of the contents of any of those packages. (337). His only basis for assuming that the packages contained phendimetrazine and phentermine was that the invoices accompanying the packages so stated. (333- 37)*

In response to counsel's motion to dismiss for failure to prove the nature of the substance (1873 - 1916, 1927 - 31), the prosecutor relied almost exclusively on the invoices:

> "I think I have to be candid with the court and say that the government is in serious trouble here if we cannot prove these transactions by business records." (1886)

If this Court agrees with the arguments set forth in Point I, then the Vitarine invoices are out of the case and, based on the prosecutor's own concession, there is insufficient proof of the nature of the substances.

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*The situation was precisely the same re Fernald and the Wingate shipments: Fernald testified that he was not permitted to open packages received from manufacturers (which constituted Wingate's entire stock) [1113], so he did not know their contents.

Assuming arguendo that the invoices remain in the case, there is still insufficient proof. There was not a shred of direct proof that the packages contained phendimetrazine or phentermine: No chemist testified that tests showed this to be so; no expert testified that the size or shape or color of the pills discussed was unique to these drugs; there was no testimony that these drugs had unique qualities so that the absence of complaint could lead to an inference that the drugs were as claimed.

In fact, there were complaints on several occasions as to the "undesirability" of the product received (501), including an attempt to return it. (1153) It appears that phendimetrazine and phentermine bore a close resemblence to and were used interchangeably with an uncontrolled drug called caffeinamine;* sales of all three were discussed at the same time and shipments of all three went together. As a matter of fact, Berry admitted boasting that he could talk so fast he could confuse customers into taking caffeinamine in place of the other drugs (1377 - 78), and the best that Fernald would say is that he could not recall discussing with Berry substituting caffeinamine for the other drugs, but he could not say the conversation never took place. (1062)

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*Dr. Johnson, whose practice seemed to be largely limited to weight reduction cases, said he used phendimetrazine and caffeine. (1280, 1304)

Furthermore, it must be remembered that Fernald was looking for a way to sell to Pastor, at a lower price than Danbury did and since caffeinamine was uncontrolled, it probably was cheaper than the controlled phendimetrazine and phentermine.

It will be readily conceded that the nature of a substance can be proved by circumstantial evidence. United States v. Iacopelli, 483 F.2d 159 (2nd Cir., 1973). However, in finding proof of this element beyond a reasonable doubt, "The jury may not be permitted to conjecture merely, or to conclude upon pure speculation. . ." United States v. Taylor, 464 F.2d 240, 243 (2nd Cir., 1972). In view of the suspect nature of the documentary evidence (see Point I), even if it is added to the other circumstantial evidence, and particularly in view of the countervailing evidence, there was not proof beyond a reasonable doubt.

None of the cases researched has upheld a conviction under these circumstances. In Iacopelli, supra, the appellant contended that there was no showing that a sealed box contained sodium secobarbital. This Court affirmed the conviction primarily because all of the shipping records said "sodium secobarbital" and "No showing was made of any departure from American Quinine's normal course of operations in filling orders that might lead one to suspect sodium secobarbital was not in the cart appellant picked up." 483 F.2d 161-62. Here, by comparison, Vitarine's records have been shown to be highly

suspect, if not inadmissible (Point I), and there was a great deal of evidence pointing toward some other drug as having been in the packages Vitarine shipped.*

All of the cases dealing with narcotics are distinguishable because they involved chemist's tests (United States v. Haynes, 398 F.2d 980, 987 [2nd Cir., 1968]), other expert testimony (United States v. Atkins, 473 F.2d 308, 313-14 [8th Cir., 1973]), visual identification of the drugs (United States v. Agueci, 310 F.2d 817, 828-29 [2nd Cir., 1962]), exorbitant price paid for small amount (United States v. Fiotto, 454 F.2d 252, 254 [2nd Cir., 1972]), and/or the absence of complaints from "customers" (United States v. Atkins, supra).

Assuming, without conceding, that the evidence was sufficient to take the case to the jury on this element of the crime, a carefully worded charge was necessary in order to focus the jury's attention on the conflicting evidence. What the jury got was pure boilerplate:

> "There are two classes of evidence recognized and admitted in courts of justice upon either of which you may find an accused guilty of a crime. One is called direct evidence.
>
> Direct evidence tends to show the fact in issue without need for any other amplification, although, of course, there is always

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*It must be rememberd that Vitarine's president, Saul Green, was an unindicted co-conspirator in this case. (793 - 94)

a question whether that evidence is to be believed.

Circumstantial evidence, on the other hand, tends to show other facts from which the fact in dispute may reasonably be inferred.

It is that evidence which tends to prove the fact in issue by proof of other facts which have a legitimate tendency to lead the mind to infer that the facts sought to be established are true. In other words, circumstantial evidence concerns facts proved from which the jury may infer by a process of reasoning other facts in dispute." (2273)

When the court finished the preliminary portion of its charge, defense counsel immediately objected:

"When discussing circumstantial evidence, the Court did not indicate that proof that the drugs in question here were phendemetrazine and phentermine was established or attempted to be established by circumstantial evidence; that there was no direct evidence in the case with regard to the identification of the drugs but the existence and that was established by circumstantial evidence, in other words, invoices, but no direct evidence in the case, your Honor. I don't think the jury understands that there was no direct evidence with regard to the identification of the drugs." (2308 - 09)*

When the court resumed its charge, it merely said:

"In considering the evidence which has been submitted to you, one of the determinations which you will have to make is whether the substance involved in each of the alleged transactions in Counts 2, 3 and 6, which transactions serve as the basis for the various counts, was in fact phendimetrazine

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*This objection was made by co-appellant's trial counsel and was joined in by appellant Weiner's trial counsel. (2309)

> or phentermine as alleged in the indictment. So that before you can find a defendant guilty of the particular count you must find beyond a reasonable doubt that the substance involved was in fact phendimetrazine or phentermine as alleged in the particular count." (2320 - 21)

In a federal criminal prosecution, it is the duty of the trial court, where necessary, to apply the law to the facts in issue so that the jury is not dealing with abstract propositions but understands the issues in the case. Heller v. United States, 104 F.2d 446 (4th Cir., 1939). In fact, where marshalling is necessary to "assist the jury in winnowing out the truth from the mass of evidence" (United States v. Tourine, 428 F.2d 865, 869 [2nd Cir., 1970]), the failure to do so will be plain, reversible error even where defense counsel requested that there be no marshalling. United States v. Kelly, 349 F.2d 720, 757 (2nd Cir., 1965).

In this case, all defense counsel requested was a reference to the fact that all of the prosecution's proof on the issue of the nature of the substances was circumstantial and based on the invoices. In United States v. Agueci, supra, the court upheld a drug possession conviction where the judge charged the jury on the evidence in the "seven categories of circumstantial evidence which the jury might consider in determining whether [there was] a. . .narcotic drug."

The failure of the trial court here to accede to defense counsel's much less arduous request requires a new trial.

POINT V

THERE WAS NO PROOF OF FRAUD OR MISREPRESENTATION WITHIN THE MEANING OF TITLE 21, UNITED STATES CODE, SECTION 843(a)(3).

At the conclusion of the Government's case, defense counsel moved to dismiss on the ground that "there is no proof whatsoever that anybody was defrauded."* It was pointed out that the Government's proof was that Charles Fernald, Douglas Berry and Saul Green were all co-conspirators; therefore, nothing that appellants allegedly did (including the alleged forging of Dr. Johnson's signature) defrauded anyone. The prosecutor responded that the "fraud" was practiced on "the people of the United States and the Government of the United States" or the DEA, which was "deceived" and was the victim.** The court then denied the motion. (1924 - 27) This was error.***

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*Title 21, United States Code, Section 843(a)(3) reads: "It shall be unlawful for any person knowingly or intentionally. . . to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge."

**Fernald and Berry were named co-conspirators in the indictment and Saul Green was added in the Government's Supplemental Bill of Particulars. In both the original and Supplemental Bills of Particulars, the prosecution said that the misrepresentations occurred during discussions between Fernald and Pastor concerning drugs for Dr. Johnson. Since Fernald was a co-conspirator, there could be no misrepresentation to him so the prosecutor came up with the theory of the deception of the DEA. (See, 2056 - 65)

***Consistent with this position, the court charged the jury that if it found the drugs to have been obtained as Fernald testified, "then in this case it is the Government to whom the misrepresentation or fraud or forgery is made." (2322) This, too, was error, for the same reasons as will be set forth above.

The prosecutor's theory was that since the DEA licenses and regulates the flow of controlled substances, anyone who obtains possesion thereof illegally does so by a "misrepresentation, fraud, etc." under 843(2)(3). There are several interrelated reasons why this is not true.

All of the terms used in Section 843*a)(3) ("misrepresentation, fraud, forgery, deception or subterfuge") imply a direct lie to another person who relies on the lie and is deceived. Since, as noted, Fernald, Berry and Green were coconspirators, none of them was deceived and none of them relied on what was allegedly said by Pastor.

The prosecutor's theory really applies to subdivision 4 of Section 843(a) which makes it a crime to furnish -

> ". . .false or fradulent material information in. . .any. . .document required to be made, kept or filed under this subchapter or subchapter II of this chapter."*

An invoice containing false information as to the purchaser would clearly come within this subdivision and would be a deception worked on the DEA.**

The legislative history of Section 843(a)(3) contains no discussion of this matter; see, 1970 United States Code,

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*Cf. §824(a) which permits revocation of a license because of falsification to the DEA of any license application.

**Of course, appellants were never charged under this subdivision so their convictions cannot be upheld thereunder. This is the section a manufacturer would violate if he knowingly sold drugs and kept false records. (See, 2058 - 61)

Cong. & Admin. News 4566 - 4660, esp. 4615 - 16) but the few cases decided under this law supports appellant's theory:

(1) United States v. Iacopelli, supra, involved a Section 843(a)(3) violation based upon a pharmacist lying to another pharmacist, obtaining BNDD forms, altering them and obtaining pills from an unknowing retailer;

(2) United States v. Bass, 490 F.2d 846 (5th Cir., 1974), involved a Section 843(a)(3) violation based upon a private person forging prescriptions, as well as getting other prescriptions by lying and obtaining pills from an unknowing pharmacist; the court there held that Section 843(a)(3) requires a "material misrepresentation, fraud, deception or subterfuge which is a cause in fact of the acquisition of a controlled substance." (Id. at 857 and re 12);*

(3) United States v. Ruyle, 524 F.2d 1133 (6th Cir., 1975), involved a Section 843(a)(4) violation where a registered distributor obtained drugs outside of his registration by filing false reports.

In sum, any misrepresentations, etc. did not "cause the acquisition" of any drugs by Fernald, Pastor or Weiner and all of appellants' convictions must be reversed.

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*Since everyone involved in this case was aware that Dr. Johnson had ordered no drugs, their acquisition by Fernald, Pastor or Weiner was not "caused" by the misrepresentation.

POINT VI

THE COURT'S CHARGE CONTAINED REVERSIBLE ERROR.

A. Improper Charge on Whether or not Fernald was a Co-Conspirator.

The evidence in this case presents a conflicting picture of Charles Fernald: On the one hand, he was named in the indictment as an unindicted co-conspirator and was obviously presented by the prosecutor as the willing partner of appellants in the crimes alleged; on the other hand, the Government's own bills of particulars stated that misrepresentations were made to him and his testimony contains numerous denials that he committed any crimes with appellants.* There was other evidence which also cut for and against Fernald's criminal involvement: On the one hand, the prosecutor recommended that Fernald's probation be revoked because of his dealings with Pastor and Weiner, but on the otherhand, his probation was not revoked and he was never told to have no further dealings with them (973 - 99, 1320); on the one hand, the prosecutor said that anything Fernald did after January, 1974 was in the status of an undercover agent acting without illegal intent, while on the other hand, the prosecutor sought Fernald's imprisonment

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*See, e.g., his statements that since Pastor told him that he (pastor) had all necessary BNDD licenses, he (Fernald) did not believe his dealings with Pastor were illegal. (1004 - 05, 1008, 1014).

for some past - 1/74 acts (1067 - 86); Fernald himself said his "cooperation" started and stopped at different times, especially after May, 1974 when he was sentenced and at one point specifically said he was not cooperating with the DEA during the period of his dealings with appellants. (1184 - 1215)

Many of the things Fernald testified to made no sense if he was a co-conspirator. His testimony that Pastor told him that he (Pastor) was buying for Dr. Johnson is inconsistent with the Government's theory that he and Pastor fraudulently used Dr. Johnson's name. Fernald's testimony that he had asked Weiner and Pastor how to get in touch with Dr. Johnson (because of the mis-deliveries) also contradicts the Government's theory that Dr. Johnson had no part in these deals.*

At several points, the court itself said it was unclear what role Fernald played in his dealings with appellants. (1092, 1166). The theory of the defense was that appellants never did anything Fernald said they did and that he concocted all of the documents to frame them. (2125 - 27) However, recognizing that the jury might believe the documents, the defense had an alternative position and that was that if the transactions occurred, they were completely legal or, at least, Fernald thought they were. The importance of Fernald not

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*It must be remembered that Dr. Johnson was tried (and acquitted) of these very deals. (241)

being a co-conspirator is manifold: On the factual level, Fernald's not being a co-conspirator removes the sinister connotation of many of the things he testified to (cash payments, desire not to receive invoices, etc.); on the legal level, nothing that Fernald did could constitute either an overt act re conspiracy nor the basis for venue re the substantive acts (see, court's charged at 2294 - 94, 2311 - 21 keying both the conspiracy and substantive counts to what Fernald did).

As indicated above, the trial court eventually found Fernald to be a co-conspirator. (1995, 2057) The court charged on accomplice testimony (2261 - 22), read the indictment (charging Fernald to be a co-conspirator; [2281, 2282]) and keyed all of the overt acts and substantive counts to "Charles Fernald, a co-conspirator." (2294, 2312, 2315)

The court ignored a request by defense counsel that itcharge the jury "that they have the right and obligation to determine who the co-conspirators are and that they don't have to be bound by the allegations in the indictment." (2308)* The court had also given no "limiting instructions" on the issue of "subject to connection" when Fernald testified during the trial. (E.g., 401, 428, 489) See, United States v. Pordum,

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*A passing reference or two to Fernald as an "alleged" co-conspirator (2288) is insufficient. Cf. 2313 ("And, of course, you must find that Charles Fernald was a member of the conspiracy or a co-conspirator as alleged in the indictment.")

451 F.2d 1015 (2nd Cir., 1971). (Such preliminary instructions are not premature and, indeed, are recommended).

By refusing to charge the jury as requested, the court deprived the jury of any way to adopt the defense's theory and acquit appellants because of failure to prove any overt act or venue in New York. This was reversible error.

B. Pinkerton

Over objection that Pinkerton was inapplicable because there was no venue in the Southern District on the substantive counts, the trial court told the jury it could convict appellants on those counts if they were committed in furtherance of the conspiracy. (1923 - 24, 2312 - 14) Appellant respectfully adopts the arguments of co-appellant Pastor on the venue - Pinkerton issue. (Federal Rules of Appellate Procedure, 28[i]).

Furthermore, even if venue was proper, the Pinkerton charge was wholly inappropriate on the facts of the case. In Pinkerto v. United States, 328 U.S. 640, 645 (1946), the type of charge given here was upheld. However, it was criticized and limited only three years later (Nye & Nissen v. United States, 336 U.S. 613 [1949]) and has been further restricted by this Court.

In both United States v. Miley, 513 F.2d 1191, 1208-09 (2nd Cir., 1975) and United States v. Sperling, 506 F.2d 1323, 1341-42 (2nd Cir., 1974), this Court said that Pinkerton should

not be charged where proof of participation in the conspiracy was weak and proof of participation in the substantive counts was strong. This was the case here.

Fernald testified that Weiner was "present" when he and Pastor discussed this scheme, but that Weiner did not say anything. And, of course, Pastor's role in this "conspiracy" was much greater than Weiner's. With regard to Counts five and six, of which Weiner was convicted, the proof of Weiner's participation was much stronger: He paid for some and picked up others. On these facts and in view of the jury's failure to convict on the other three substantive counts, the giving of the Pinkerton charge was prejudicial and reversible error.

C. Aiding and Abetting

The trial court charged that the appellants could be found guilty of the substantive counts if the jury found that Fernald acquired any of the pills and appellants aided or abetted him. (2314 - 16) This was objected to on several grounds: If Fernald was not a co-conspirator, then his possession was not guilty (see Point VI-A), and that there was no venue in the Southern District of New York (see Pastor's brief).

The giving of this charge was reversible error.

POINT VII

PURSUANT TO RULE 27(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT WEINER RESPECTFULLY ADOPTS THE APPLICABLE POINTS AND ARGUMENTS RAISED BY APPELLANT PASTOR.

Pursuant to Rule 27(i) of the Federal Rules of Appellate Procedure, appellant Weiner incorporates by reference the applicable points and arguments raised by appellant Pastor, including but not limited to, the following:

(1) The procedure by which phendimetrazine and phentermine were added to the list of controlled substances was unconstitutional;

(2) The absence of appellant Pastor during the jury selection was violative of the right to a fair trial;

(3) The actions of the trial court, directed primarily toward appellant Pastor and his counsel, deprived appellant Weiner of a fair trial (United States v. Guglielmini, 384 F.2d 602 [2nd Cir., 1967]);

(4) There was insufficient proof of venue or overt acts in the Southern District of New York and the court's charge on this was error.

CONCLUSION

For the aforementioned reasons, the judgment of conviction appealed from must be reversed and the indictment dismissed or, in the alternative, there must be a new trial.

Respectfully submitted,

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Service of 2 copies of this within
Brief is admitted this
15 day of November 1976.

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